UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOU'S TRANSPORT INC., and
T.K.M.S., INC., a Single Employer
and/or Joint Employers

and Case No. 07-CA-102517

MICHAEL HERSHEY, an Individual

and

T.K.M.S., INC.

and Case No. 07-CA-113640

JEFFREY ROSE, an Individual

Donna M. Nixon, Esq.,
for the General Counsel.
Amy D. Comito, Esq., and
Kelly M. Kammer, Esq.,
(Steven A. Wright, P.C.)
Shelby Township, Michigan,
for the Respondents.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. These consolidated cases were tried in Detroit, Michigan, on February 24 and 25, 2014. Michael Hershey, an individual charging party, filed the initial charge in case 07-CA-102517 on April 11, 2013, and amended charges in that case on May 30 and September 26, 2013. Jeffrey Rose, an individual charging party, filed the charge in case 07-CA-113640 on September 18, 2013. The Regional Director for Region Seven of the National Labor Relations Board (the Board) issued the consolidated amended complaint (the complaint) on January 31, 2014. The complaint alleges that Lou's Transport, Inc. and TKMS, Inc., a single employer and/or joint employers discriminated in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) when they encouraged employees to resign their employment, issued verbal warnings to employees, and discharged employees, because those employees engaged in protected concerted activity and to discourage such activities. The

Respondents filed a timely answer in which they denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

Respondent Lou's Transport and Respondent TKMS (collectively referred to herein as "the Respondents") are corporations with offices and places of business in Pontiac, Michigan, and are engaged in the intrastate transportation of freight including aggregates of various kinds. In conducting their operations during the fiscal year ending December 29, 2012, each of the Respondents has provided services valued in excess of $50,000 to the Barton Malow Company, an enterprise within the State of Michigan that is directly involved in interstate commerce. The Respondents admit, and I find, that individually and collectively they have been employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts

Respondent Lou's Transport and Respondent TKMS are trucking companies owned by Dan Israel. The Respondents have a number of managers and supervisors in common, share the use of some equipment and facilities, and also use the same written statements of "core values" and "6 cardinal safety rules," and the same Team Member Handbook.[1] This case concerns the Respondents' treatment of its employees working as truck drivers at the "Sylvania quarry" jobsite. The Sylvania jobsite is a limestone and sandstone quarry that is owned by Great Lakes Aggregate (Great Lakes), a non-party. Great Lakes contracts another non-party, Dan's Excavating (Dan's), to extract and load material from the quarry. In order to reach the quarry's reserves of limestone and sandstone it is necessary for Dan's to remove a top layer of dirt and clay. That is where the Respondents come in. Dan's subcontracts with the Respondents to transport this dirt and clay from the pit area to a dumpsite at another location on the quarry property. Individuals working for Dan's direct the Respondents' drivers to specific locations at the pit area and load the Respondents' trucks with dirt and clay. The Respondents' employees then drive to the dumpsite where individuals working for Dan's direct them to the specific location where the material is to be unloaded. The round trip route from the pit area to the dumpsite and back is less than a mile, and the drivers cover that route approximately four or five times every hour. Dan's pays the Respondents on a per truck/per hour basis for these services.

[1] The complaint alleges that Respondent Lou's Transport and Respondent TKMS are a single employer and/or joint employers. At the start of the trial, the General Counsel and the Respondents submitted written stipulations providing that the Respondents would be jointly and severally liable for any remedies found to be appropriate and that, for purposes of this litigation only, all individuals alleged to be agents in the complaint (Dan Israel, Bruce Israel, David Laming, Jeffery Laming, Sean Schmidt, Tony Allen) were agents of both Respondents with respect to the discipline and termination of the charging parties. The understanding was that this would alleviate the need to litigate the question of single/joint employer status. Given that understanding, the relationship between the two Respondents is discussed in this decision only for the purposes of providing context. I make no finding regarding the alleged single/joint employer status of the Respondents.

Each of the Respondents' trucks at the quarry consists of a tractor and a trailer, and transports loads in excess of 100,000 pounds.

During the relevant time period, up to six of the Respondents' drivers at the quarry were employees of Respondent Lou's Transport, and from eight to twenty were employees of Respondent TKMS.[2] All of the Respondents' drivers, whether employed by Lou's Transport or TKMS, do exactly the same work at the quarry and park their trucks overnight at the same TKMS-operated yard facility. The quarry is considered a mine for purposes of regulation by the Mine Safety and Health Administration (MSHA).

The record shows that working conditions for the Respondents' drivers at the quarry are challenging. The route that the drivers traverse at the quarry consists almost entirely of non-paved, onsite, roads of clay, dirt, and stone. These roads are very slippery and become more so when they are wet or thawing after a freeze. Dan's is responsible for maintaining these onsite roads, which deteriorate quickly and require daily resurfacing and rebuilding. The condition of the onsite roads is often quite poor and this results in extreme wear and tear to the trucks.

During the time period at issue here, the Respondents' drivers were dissatisfied with the efforts that the Respondents and Dan's were making to keep the onsite roads and the trucks in a safe and appropriate condition. Sean Schmidt, the Respondents' manager for the quarry project, stated that *every* driver complained to him about the roads and the condition of the trucks. According to Hershey, drivers complained to Schmidt at least three times a week about roads and equipment. Drivers also complained about what Hershey called "messed up paychecks." David Laming (D. Laming) a higher level official with authority over the Respondents' other managers also received complaints from drivers. Jeffrey Laming (J. Laming), the Respondents' operations manager, testified that he was aware that there were issues with the condition of the tires on the trucks used at the quarry. Drivers also noted problems with the trucks on the daily pre-trip inspection reports that they submitted to the Respondents. The parties disagree about the reasonableness of the efforts that the Respondents and Dan's were making to maintain the roads and equipment, but it is not necessary for me to wade into that disagreement in order to resolve the questions presented here. I do, however, find that the drivers were complaining in good faith about what they believed, correctly or not, were unreasonable deficiencies affecting their safety. I am persuaded of this by the undisputed testimony that every driver who worked at the quarry complained to Schmidt and that in about February 2013 the drivers became so alarmed about the safety of the onsite roads that they collectively refused to continue the day's work and were sent home. The record shows that one of the Respondents' trucks had flipped over at the quarry, that the trucks were frequently damaged due to the condition of the roads, and that the trucks were operated in proximity to drops of as much as 200 feet.

The lines of authority at the quarry were overlapping to some degree. Schmidt, who managed the Respondents' nearby yard, visited the quarry up to four times a day and was the Respondents' supervisor for the drivers there. He inspected the onsite quarry roads, checked in with the drivers, and answered questions that Dan's or Great Lakes personnel had for the Respondents. Schmidt reported to J. Laming who also visited the job site from time to time. As noted above, personnel from Dan's, a non-party, gave the Respondents' drivers direction at the quarry. Vito Stramaglia, who worked for Dan's, was the superintendent of the quarry operation

[2] At the times relevant to the claims in the complaint, the Lou's Transport drivers were represented by Teamsters Local 614, and the TKMS drivers were not represented by a union. The complaint does not allege any violations based on employees' union activities or affiliation.

and was there throughout the day overseeing the project. In that capacity, he, inter alia, signed the Respondents' drivers "in" and "out" and directed their work. Bill Begley, who was the Great Lakes manager for the quarry, rarely interacted directly with the Respondents' drivers.

B. Rules and Values Promulgated by Respondents

The Respondents justify the disciplinary actions they took with respect to Hershey, Rose and a third driver, Timothy Pledger, by referencing three documents that they promulgated to employees – specifically, a statement of "core values," a statement of "6 cardinal safety rules," and the rules of conduct set forth in the Team Member Handbook. The clause in the "core values" document that the Respondents rely on directs employees to "overlook the chatter." J. Laming explained this "core value" by stating, that "drivers especially, they get on their CBs and they, you know chatter about things, you know; overlooking the rumors and all the stuff that goes on."[3] He said "chatter" is "what gets people going."

The Respondents also relies on two of their "cardinal safety rules" – one that concerns the use of cell phones and the other the use of hard hats. The cell phone rule requires "100% Compliance with absolutely no cell phone use while driving forward or reverse in commercial vehicles or heavy equipment." In the absence of a medical emergency, an employee who needs "to send or receive a phonecall" is to "do so in a designated break location at the facility." The evidence showed that drivers often use their cell phones while stopped in their trucks and that the Respondents condoned such use. However, the evidence did not show that the Respondents condoned drivers' use of cell phones while their trucks were moving.[4] The drivers were, however, permitted to communicate using citizens band radios (CBs) and company radios while driving.

The safety rule regarding hard hat usage by drivers requires "100% compliance with wearing [a] hard hat . . . all the time out of the vehicle." Because the quarry was considered a mine for purposes of MSHA, the Respondents and Dan's personnel informed drivers that it was also necessary that drivers wear hard hats while inside their trucks. The rule requiring the wearing of hard hats inside the trucks was not one of the Respondents' written cardinal safety rules, but a site specific modification of its rule. The record shows that, despite the site specific rule, it was common for Schmidt to see drivers working inside their vehicles without a hard hat on. Charging party Rose was the only driver to whom Schmidt ever issued discipline for such conduct.

The Respondents' employee handbook lists 50 rules of conduct, the violation of any of which "will, in the discretion of the Company, result in disciplinary action up to and including discharge." The rule that the Respondents rely on here prohibits the "[u]se of threatening or profane language toward a fellow Team Member, Management, personnel, or a customer." The evidence showed that despite this rule, drivers at the quarry regularly used profanity and

[3] The other core values set forth by the Respondents' document on the subject are: never say can't; honor all commitments; proactive communication (good and bad news must travel fast); details make the difference; T[ake] A[im] A[nd] F[ire]; desire to be part of something special; willingness to change and grow; home grown; and built to last.

[4] Charging Party Rose, who the Respondents state that they discharged in part for talking on a cell phone while driving his truck, testified that he had seen other employees engaging in the same conduct. Rose did not state how often he witnessed such conduct, nor did he claim that he ever witnessed it occurring in the view of supervisors or managers of the Respondents. Even if I credit Rose's testimony on this subject, it would not show that such conduct was prevalent, or that the Respondents' officials knowingly allowed it.

sexually charged language. Most of this occurred during conversations between drivers who were speaking on the CBs or company radios in their trucks. There was also credible testimony from Pledger[5] that he heard Israel, J. Laming, and D. Laming all use profanity on the company radio at one time or another. In one instance, Pledger heard a manager tell employees to stop cursing on the radio, however, not all drivers at the quarry received that instruction. In particular, charging party Rose was never told to stop cursing on-the-job prior to the day the Respondent discharged him. The word "fuck" was used frequently by drivers, but most often as an interjection (for example "fuck, I hit a rock," Tr. 275), a participial adjective expressing disparagement or discontent (for example "fucking weather," Tr. 216), a verb (for example "weather – it's fucking us up," Tr. 183), or an adverb (for example, "that fucking sucks," Tr. 292). On occasion the Respondents' drivers would direct the word at one another to express contempt or hostility, as in "fuck you," but there was credible testimony indicating that this usage was less commonplace. Tr. 344-345. While the record indicates that the Respondents generally tolerated drivers using profanity in the ways set forth above, there was no credible evidence that the Respondents had ever tolerated drivers saying "fuck you" to personnel of their customer at the quarry – i.e., Dan's – or to using that, or comparable language, to communicate refusal to accept direction from Dan's personnel. Tr.292-293. Schmidt stated that there is a difference between the Respondents' drivers cursing at one another and those drivers cursing at a customer such as Dan's. He testified that it is unacceptable for drivers to direct profanities at a customer and that doing so is grounds for discharge.

C. The Respondent's Reaction to Overhearing a Radio Conversation between Hershey and Pledger

Hershey was hired by the Respondents as a driver in July 2012, and transferred to the quarry project in November 2012, the same month that the Respondents began work there. Pledger, another driver, began his employment with the Respondents in August 2007 and also worked on the quarry project. On January 7, 2013, Hershey and Pledger had a conversation over the company radios in their trucks. They were using a channel that drivers believed was neither monitored by the Respondents nor used for any official purpose. Hershey and Pledger discussed the poor condition of the onsite roads and of the Respondent's trucks and tires. Pledger told Hershey that the Respondents' personnel had urged him to drive a truck even though its tires were bad, that he ended up receiving a $600 traffic fine for driving on the bad tires, and that the Respondents left him to pay the fine himself. Such incidents were a matter of concern to Pledger not only because of the monetary fine, but because such incidents could adversely affect his rating as a commercial driver. Hershey complained that he was having trouble with the condition of his truck and that the Respondents kept telling him that the necessary parts were "on order." Hershey and Pledger discussed their view that Israel and D. Laming were "cheap" regarding how they maintained equipment and ran the company. One or both of the drivers used profanity during the conversation. No one else participated in the conversation.

Unbeknownst to Hershey and Pledger, someone had alerted D. Laming to their radio discussion while it was ongoing. D. Laming reacted by clandestinely listening in on the conversation for 30 to 45 minutes. He testified that during that time he heard Hershey and Pledger "badmouthing the company" and complaining about the trucks, the tires on the trucks, the road conditions, and the monotony of the work. He also heard the drivers disparage Israel, J. Laming, and himself. One of the two drivers said that Israel was an "asshole" and a

[5] Pledger was a former driver with the Respondents, who left that position voluntarily and on good terms. The General Counsel is not seeking any monetary relief for him.

"cheapskate." While the conversation was ongoing, D. Laming alerted Israel, who listened in as well. D. Laming testified that he was "enraged" by what he heard Hershey and Pledger saying and wanted to discharge them immediately. Israel, however, said that Hershey and Pledger might just have been "blowing off steam" and that D. Laming should talk to them.

The next day, January 8, D. Laming met with Hershey and Pledger. Schmidt was also present. D. Laming revealed that he had listened to Hershey's and Pledger's radio conversation the day before and asked "Why are you still here?" Pledger testified that he was worried that he might be fired depending on how he answered the question. D. Laming went on to say that he "didn't like" their "attitudes" and that "complaining on the radio is very unprofessional." He said that the Respondents spent "a lot of money and equipment to repair things and if [Hershey and Pledger] have a problem, [they] need to find a different place to work." He also stated that "if . . . per your conversation you think this is terrible place to work, you know, I would never work anywhere that I wasn't happy working, and why do you work here?" Hershey and Pledger apologized for their comments and said that they were just venting and had not meant D. Laming to hear them. D. Laming prepared disciplinary paperwork stating that Hershey had received a "verbal warning for bad mouthing [the] company and improper language on company radio." He noted on the paperwork that both Hershey and Pledger "were sorry for their actions" and that he believed "they will both do a good job going forward." D. Laming testified that he created separate paperwork documenting a verbal warning for Pledger based on the incident. Shortly after hearing the radio conversation, D. Laming offered to allow Hershey to transfer to a position away from the quarry as a dirt dump supervisor. Hershey declined because he would have earned less in that position.

D. Hershey's Signs

In late December 2012 or early in January 2013, Hershey began preparing handmade signs, each 8.5 by 11 inches in size, that he would intermittently place in the lower left hand corner of his truck's windshield. Each time he made a new sign, Hershey would display it during one or two loops around the quarry. The signs could be seen by the drivers, as well as by personnel of Dan's and Great Lakes. Hershey meant for the signs to amuse and boost the morale of the other drivers. A good number of the signs carried messages that were critical of the drivers' working conditions, including the way the trucks and the onsite roads were being maintained, and issues with paychecks. Among the signs were ones that read: "BRAKES ON ORDER"; "PAYCHECK ON ORDER"; "REAL LIFE ON ORDER"; "ICE ROAD THIS!"; "GOT TIRES?"; "TIRES 'R' US"; "SLIPPERY WHEN WET";[6] "SHOOT ME PLEASE!" and "HELP!" Several of Hershey's signs also mocked the Respondents' "JDL" certification. J. Laming testified that the Respondents never told drivers that this was anything more than an internal certification, but Hershey was surprised when a police officer informed him that it was not an independent safety certification and that "JDL" certified meant "Jeffrey and David Laming" certified. Two of Hershey's signs said "J.D.L. THIS!" and one of those signs also included a stick figure drawing of a person grabbing his or her crotch while dancing in the manner associated with the entertainer Michael Jackson. The drawing is very simple and does not include any representation of genitalia or other graphic details. Another sign carried the message "I GOT YOUR J.D.L. RIGHT HERE." Some of the signs did not concern working conditions at all, including one that made reference to a sex act. There was credible testimony that drivers were amused by Hershey's signs. Prior to the day of Hershey's discharge, no co-worker, supervisor or manager had ever told him that the signs were inappropriate.

[6] This was a reference to Hershey's view that the Respondents required the drivers to operate even when the roads were wet and, therefore, particularly hazardous.

E. Rose

Rose was a driver on the quarry project who was hired by the Respondents in late November 2012, and was terminated about 4 months later on March 25, 2013. During Rose's tenure with the Respondents, Schmidt heard him complaining on the radio and came to see him as an instigator of negativity on the radio. The record does not show when Schmidt overheard Rose make these statements.

The disciplinary paperwork for Rose's termination was prepared and signed by Schmidt and dated March 25. It stated that Rose was being warned and discharged that day on the basis of insubordination, violation of a safety rule, and uncooperative performance. In the "details" section of the document, Schmidt wrote:

> Issue #1: On 3/23/2013 I saw Jeff Rose Driving on the Sylvania [quarry] site without a hard hat on and asked him where it was? He stated "the strap was broken on it." I gave him a new hard hat. Issue #2: It was brought to my attention that on 3/22/13 around 5:00 the Dan's operator Gary Martin told Jeff Rose "we are loading until 5:00 pm and to get another load." Jeff Rose responded, "fuck you and fuck Vito." I didn't know about this until this morning when Vito Stramaglia (Dan's Superintendent) told me.

The exit interview form prepared by the Respondents that day describes the reason for Rose's separation as "Services are not longer needed. Does not meet company core values."

At trial, Schmidt testified that his decision to terminate Rose was the result of a "culmination of things" and he discussed purported shortcomings in addition to those described above. Schmidt stated that in late February or early March 2013, Rose had an accident while driving for the Respondents and that in March 2013 Rose had been caught talking on a cell phone while he was driving. Schmidt testified that the incident on March 22 when Rose purportedly cursed at a customer was "the straw that broke the camel's back."

Regarding the accident, the evidence showed that Rose had been told to return the truck he was driving to the Respondents' yard because the brakes were not working properly. As Rose turned the truck while nearing the yard, the brakes malfunctioned and the truck jack-knifed. The first company official at the scene, J. Laming, asked Rose: "What the hell happened? What'd you do?" After Rose explained, J. Laming told him to get another truck and keep working. J. Laming did not send Rose for a drug test or testify that the accident was Rose's fault. Schmidt, however, testified that he subsequently examined skid marks at the scene and formed the opinion that the skid marks were created during the accident and showed that Rose had been driving too fast. The Respondents did not issue discipline to Rose at the time of the accident. Rose was discharged some weeks later, but the paperwork explaining that decision did not mention the accident.

Regarding the cell phone incident, the evidence showed that one day in March 2013, as Rose was driving into the Respondents' yard, he received a call from a mechanic. Rose answered the call while his truck was moving and Schmidt witnessed this conduct. Schmidt reacted by yelling at, and verbally reprimanding, Rose for talking on the cell phone while driving. At the time of Rose's termination, Schmidt told him that the cell phone incident was one of the reasons for the action, although the termination paperwork did not specify that as a reason.[7]

[7] At one point, Rose testified that Schmidt yelled at him because he was driving while talking on the cell phone, and that, at the time of the discharge, Schmidt stated that the cell phone was one of the reasons

On two occasions, Schmidt saw Rose violating the quarry-specific rule requiring drivers to wear hard hats while inside their trucks. Schmidt witnessed the first violation on about March 16 or 17, 2013, and alerted Rose to the violation. The second violation was on March 22 or 23, and this time Schmidt gave Rose a warning as part of the same March 25 disciplinary paperwork that documented Rose's discharge.[8]

There was an ongoing conflict at the quarry between Stramaglia (Dan's quarry superintendent) and the Respondents' drivers. Stramaglia wanted the drivers to continue receiving loads until the shift ended. Drivers resisted taking loads close to the end of the shift because they found that doing so meant that they would not complete their work until after the shift ended and would not be compensated for the post-shift work. On Friday, March 22, 2013, Rose stopped accepting loads shortly before his shift was scheduled to end at 5 pm. Stramaglia had told the Dan's employees to continue loading the Respondents' trucks until the end of the shift. Consistent with that instruction, one of Dan's employees, an operator named Greg Martin, told Rose to take another load. There is no dispute that this led to a hostile exchange between Rose and Martin. Rose testified: "He's like, fuck you go, go [take another load]. And I'm like, no, fuck you. So he's like, go or I'll kick your ass." Tr. 209.[9] Stramaglia was not a witness to this exchange, but his understanding was that when Martin relayed the instruction to take another load, Rose responded "fuck you" and "fuck Vito too."[10] Subsequently, on Monday, March 25, Stramaglia informed Schmidt about the hostile exchange between Rose and Martin. Stramaglia testified that his purpose in doing this was to let Schmidt know about the difficulty he was having with drivers who did not want to take loads as the end of the shift approached. Stramaglia was not concerned about the language that Rose had used, but nevertheless he reported to Schmidt that Rose had said "fuck you" and "fuck Vito too."

The General Counsel argues that for purposes of assessing the severity of Rose's conduct during the March 22 incident with Martin, I should not consider Dan's to be the Respondents' "customer." That argument is not persuasive. It is undisputed that the Respondents drivers were working pursuant to a contract with Dan's and that Dan's was the

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for the discharge. Transcript at Page(s) (Tr.) 189, 190. However, Rose also testified that no supervisor spoke to him about his use of the cell phone until subsequent to his discharge and that Schmidt never told him that the cell phone usage was a reason for his discharge, Tr. 190. Based on my review of Rose's inconsistent testimony, I conclude that Schmidt did talk to Rose about the cell phone violation at the time of that violation and did mention it to Rose when terminating his employment. That testimony was specific and against Rose's interests, and therefore it is unlikely that he would fabricate it. In general, Rose had a calm and measured demeanor while testifying. However, his credibility was undermined by a number of inconsistencies in his testimony which demonstrate lapses in memory and/or an eagerness to harmonize his account with his own interests in this litigation.

[8] According to Schmidt, in the second instance Rose stated that his hard hat was broken, but when Schmidt examined it he discovered that the hard hat was not broken. Neither Schmidt, nor any other witness for the Respondent, claimed that Rose was discharged in whole or in part for misrepresenting the condition of his helmet.

[9] Here again, Rose gave inconsistent testimony. He initially testified that "I'm like, no, fuck you," to Martin, but later said that he had not "sworn" at Martin. This inconsistency, along with others in Rose's testimony, leads me to consider him less than fully reliable as a witness.

[10] Martin himself did not recall the incident at all, could not testify about what Rose did or did not say, and, in fact, did not even remember who Rose was. The General Counsel characterizes this as Martin denying that Rose cursed at him, Brief of General Counsel at Pages 38 to 39, but, in fact, Martin only testified that he could not recall whether Rose had done so or not. Tr. 265-266.

party paying the Respondents for these services. Multiple witnesses were asked to weigh in on the question, and this testimony was consistent with the Respondents' characterization of Dan's as their customer. Not only did four of the Respondents' witnesses (D. Laming, J. Laming, Schmidt, and Stramaglia) state that Dan's was the Respondents' customer, but two of the General Counsel's own witnesses (Pledger and Martin) agreed with that characterization. Pledger even went a little further and stated that the drivers were aware that Dan's was their customer.[11]

F. Rose and Hershey Speak at March 25 Safety Meeting

On Monday, March 25, 2013, a safety meeting was held at the quarry. Bill Begley, who manages the quarry for Great Lakes, made a presentation at the meeting. A total of about 30 persons attended. Among the other supervisory and management personnel present were Paul Cosgrow (project safety manager) and Stramaglia from Dan's, and Schmidt and Tony Allen (dispatcher) from the Respondents. The evidence does not suggest that J. Laming, D. Laming, or Israel were present. The drivers working at the quarry that day, including Hershey and Rose, attended the meeting.

Begley made his presentation to emphasize the importance of MSHA rules regarding road maintenance and protective equipment. During his presentation, Begley touched on a number of subjects including the importance of safety, the particular hazards presented by the arrival of spring, the importance of using care when crossing the public road that cut through the quarry, and his commitment to maintaining the roads. He encouraged the drivers to give him their input. After Begley had been talking for about 5 or 10 minutes, drivers began raising complaints about the roads. Rose went first, stating "you promised that you'd give us these good roads, and here we are driving on the slop and slurry." He said that Stramaglia was "not taking care of the roads like they've been taken care of before, and we need them taken care of." Hershey joined Rose in complaining about Stramaglia's maintenance of the onsite roads. According to Gary Grode, a driver testifying for the General Counsel, a total of three drivers raised complaints. Hershey remembered himself and Rose being the main employee speakers during the meeting. Stramaglia defended the efforts that Dan's was making to maintain the roads. Hershey and Stramaglia aired their disagreement, and then Begley stated that he "did not want to get in an argument," but rather wanted "to talk about what we need to do." He stated "we're going to see what we can do to get it solved so everybody's happy." According to the accounts of Hershey and Rose, the disagreement between employees and Stramaglia during the safety meeting had become heated and involved some yelling before Begley settled it down. Begley and Stramaglia, neither of whom works for the Respondents, both credibly testified that they did not recall the conversation becoming particularly heated. There is no claim that either Hershey or Rose directed any of their complaints during the meeting at the Respondents or engaged in any confrontation with the Respondents' agents who were present. I find that Schmidt was present at the safety meeting and had knowledge of Rose's and Hershey's statements at that meeting. I also credit Schmidt's testimony that at the time he was testifying (11 months later) he no longer had any specific recollection of that meeting.

[11] A contrary view was expressed by one former driver at the quarry, Gary Grode, who testified that he did not consider Dan's to be the customer. Grode believed that customers were those persons who came to the quarry to obtain product. I think Grode was confusing the question of who was the customer of the quarry owners, with the question of who was the customer of the Respondents' trucking operation at the quarry. At any rate, I find the contrary evidence more persuasive than Grode's opinion on the subject.

G. Respondents Discharge Rose on March 25

Later on March 25, the same day as the safety meeting, Schmidt presented Rose with disciplinary paperwork stating that Rose was being warned and discharged. According to Schmidt, he began preparing this document as a written warning based on his observation that Rose was not wearing a hard hat on March 22 or March 23. Schmidt testified that after he began preparing the paperwork, Stramaglia told him that, on March 22, Martin had directed Rose to take another load, but Rose had refused and said "Fuck you" and "Fuck Vito." Schmidt modified the disciplinary paperwork to include this incident and changed the disciplinary action from a warning to a warning and discharge. On the form, Schmidt stated that Stramaglia told him about the incident "this morning" – i.e., on March 25, the same day as the safety meeting and the issuance of the discipline. Schmidt testified that he discharged Rose based on a variety of things and that the incident Stramaglia reported was the "straw that broke the camel's back." Schmidt did not testify that he took any actions to investigate Stramaglia's account before terminating Rose. Schmidt also completed an exit interview form for Rose on March 25. There, Schmidt wrote that Rose "does not meet company core values." At trial, Schmidt testified that this meant Rose "didn't meet our core values as far as attention to safety and the way he conducted himself with our customer." Rose testified that at the time of the discharge, Schmidt told him that the action was being taken because of the hard hat incident, the cell phone incident, and "all the shit" Rose was talking on the radio.

After he was discharged, Rose called Israel to discuss what had happened. Rose told Israel that he "liked working" for the Respondents and that he had "thought that [the Respondents' operation] was going to be my home." Israel asked Rose why, if he liked working for the Respondents, he was "talking shit on the radio." Rose told Israel that his complaints were legitimate. Israel asked, "would you take your job back?" Rose said he would, and Israel said "let me call Sean [Schmidt] and . . . talk to him."[12] About 3 or 4 days later, Rose called Schmidt and asked if he had spoken with Israel. Schmidt said that he had, but that they had decided not to rehire Rose "because there was too much negativity on the radio."[13]

H. Respondents Discharge Hershey on March 27

The Respondents' terminated Hershey's employment on March 27, 2013. On that day, J. Laming became aware that drivers had been talking about Hershey's signs. He called Schmidt at about 5 am, and asked him to check Hershey's truck, which was still parked in the Respondent's yard, to see if there were any signs in the truck. Schmidt found the signs in Hershey's truck and reported on them to J. Laming. Shortly thereafter, J. Laming came to the yard. He testified that Hershey's signs "upset" him because Hershey was "talking about" the working conditions which "99.9 percent of us work so hard to make right every day." He found it "offensive" that Hershey mocked the "JDL" certification which he viewed as the Respondents going "out of our way to try to make a pleasant working environment." J. Laming characterized the signs as "verbal chatter" and therefore inconsistent with the Respondents' core value of

[12] Israel did not testify at the hearing and the Respondents did not present any other evidence contradicting Rose's facially plausible account of this conversation.

[13] This quote is based on Rose's testimony, which I credit regarding this statement. Schmidt testified that he did not recall telling Rose that he was "negative," but Schmidt did not testify that he recalled that he had *not* done so. In general, Schmidt's recollection was rather vague regarding the words he spoke to Rose that day. I note, moreover, that Schmidt testified that he considered Rose an instigator of negativity on the radio. The fact that Schmidt did, in fact, hold that view of Rose, lends some support to Rose's testimony that Schmidt expressed that view.

"avoiding the chatter." He testified that Hershey's signs stating "JDL this," "paycheck on order," "real life on order" and "breaks on order" were "stirring up the crowd." J. Laming contacted D. Laming and told him about the signs. The two discussed the January 7 episode when D. Laming heard Hershey and Pledger criticizing the Respondents, and noted that Hershey was "still talking bad" about the Respondents. D. Laming was unhappy that Hershey was displaying the signs for other employees to see and felt that they were "especially inappropriate following the discussion" he had had with Hershey in January about badmouthing the Respondents.

J. Laming and D. Laming decided to terminate Hershey for, in D. Laming's words, "his actions of creating the signs and displaying the signs and negative attitude." J. Laming prepared the termination paperwork. As the reason for the termination, J. Laming wrote "employee does not meet our core values." When Hershey arrived that morning, J. Laming called him into the office and fired him. J. Laming stated that the reason was that Hershey did not meet the Respondents' "core values." Hershey asked what that meant, and J. Laming answered, "we didn't appreciate your signs," they "pissed off my brother, and you don't meet our core values."

I. Complaint Allegations

The complaint alleges that the Respondents violated Section 8(a)(1) of the Act on about January 7, 2013, by discriminating against Hershey and Pledger when D. Laming encouraged them to resign and issued verbal warnings to them because of their protected, concerted, discussions about drivers' working conditions. The complaint further alleges that the Respondents violated Section 8(a)(1) of the Act on March 25, 2013, by discriminatorily discharging Rose because he concertedly complained about working conditions on March 25, 2013, and to discourage employees from engaging in these or other concerted activities. In addition, the complaint alleges that the Respondents violated Section 8(a)(1) of the Act on March 27, 2013, by discriminatorily discharging Hershey because he: engaged in protected, concerted, discussions regarding working conditions on January 7, 2013; concertedly complained about working conditions on March 25, 2013; and publicized complaints regarding working conditions by posting signs in his vehicle from January 14 to March 27, 2013.

III. Analysis and Discussion

A. Hershey's and Pledger's Conversation on January 7

The General Counsel alleges that Hershey and Pledger were engaged in protected concerted activity when, during their January 7 conversation on the company radio, they complained to one another about their working conditions and that the Respondents' violated Section 8(a)(1) of the Act when, because of that conversation, they issued verbal warnings to Hershey and Pledger and encouraged them to resign. D. Laming admitted that the Respondents disciplined Hershey and Pledger on January 8 because of the January 7 conversation, but the Respondents contend that the conversation was not protected activity. Since there is no dispute that the Respondents issued the verbal warnings based on Hershey's and Pledger's January 7 conversation, this case is properly analyzed using the *Atlantic Steel Co.*, 245 NLRB 814 (1979), framework. Under that framework, if Hershey's and Pledger's January 7 conversation was protected concerted activity, the Respondents violated the Act by taking action against them because of that activity unless Hershey and Pledger lost the protection of the Act due to opprobrious conduct. See *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 4 (2012).

I find that Hershey's and Pledger's conversation on January 7 was protected concerted activity. Section 7 of the Act states that employees engage in protected activity when they, inter alia, "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." The Board has held that employees engage in such activities when they complain about working conditions affecting other employees as well as themselves. *Worldmark by Wyndham*, 356 NLRB No. 104, slip op. at 13-14 (2011) (employees "engaged in concerted activities, privileged by Section 7 of the Act" when they discussed compensation problems among themselves); see also *Meyers Industries*, 281 NLRB 882, 887 (1986) (Board clarifies that the standard requiring that, in order to be concerted, the employees' action must not be engaged in "solely by and on behalf of the employee himself" encompasses, inter alia, "those circumstances where the individual employees . . . prepare for group action"), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Where the complaint is made to fellow employees it is "inherently concerted because it involves a speaker and listeners." *Belle of Sioux City*, 333 NLRB 98, 105 (2001)

The conversation at-issue here primarily concerned the safety of the onsite roads and the Respondent's trucks – matters that were of concern not only to Hershey or Pledger, but to both Hershey *and* Pledger, *Carrier Corp.*, 331 NLRB 126, 127 (2000) ("concerted activity may well include nothing more than one speaker and one listener"), as well as to the Respondents' other drivers at the quarry. The record shows that *every one* of the more than 20 drivers at the quarry brought their complaints about the condition of the roads and the trucks to Schmidt's attention, and in some cases to the attention of other management officials. In one instance drivers became so concerned about the safety of the onsite roads that they engaged in a group work stoppage and were sent home. Employees' expressions of concern are protected concerted activity under such circumstances even if the employees had not agreed to act together to seek change. See *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (employees engage in protected activity when they complained about the employer's lunch hour policy among themselves, and some employees individually expressed their dissatisfaction to management, even if the employees had not explicitly agreed to act together to change the policy).

The Respondents contend that Hershey and Pledger were engaged in "mere griping . . . not protected concerted activity" because their statements were not made to management or on behalf of other employees. This argument is not persuasive for a number of reasons, among them that Hershey and Pledger were not raising purely personal discontents, but rather discontents that they shared with one other, and with the other drivers at the quarry. In *Phoenix Processor Limited Partnership*, 348 NLRB 28, 46 (2006), petition for review denied sub nom. *Cornelio v. NLRB*, 276 Fed. Appx. 608 (9th Cir. 2008), cert. denied 555 U.S. 994 (2008), the Board affirmed the administrative law judge's conclusion that an employee engaged in protected concerted activity by talking to other employees about their wages and hours. The judge distinguished this activity from "mere griping," by explaining that "griping about a purely personal concern is not ordinarily considered action undertaken for mutual aid or protection," but "voicing concerns that pertain to working conditions affecting other employees as well as the complaining worker is protected by Section 7 of the Act." Id., citing *Alaska Ship & Drydock, Inc.*, 340 NLRB 874 fn.1 (2003). It is certainly the case that the safety issues discussed by Hershey and Pledger fall into the category of working conditions that affect other employees. *Tampa Tribune*, 351 NLRB 1324, 1334-1335 (2007) (employee's complaints are concerted protected activity, not mere griping, where co-workers were also unhappy about the same issues), enf. denied on other grounds by 560 F.3d 181 (4th Cir. 2009).

The Respondents contend that Hershey's and Pledger's conversation was not protected because they had not intentionally included representatives of the Respondents in their discussion. First, the record shows that Hershey and other drivers repeatedly made the same

complaints and related complaints to the Respondents. Even if this were not the case, the Respondents' argument would fail since the Board has made clear that employees' "'discussions with coworkers [a]re indispensable initial steps along the way to possible group action'" and therefore are protected regardless of whether the employees have raised their concerns with management or talked about working together to address those concerns. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, slip op. at 3 (2012), quoting *Relco Locomotive, Inc.*, 358 NLRB No. 37, slip op. at 17 (2012), enfd. 734 F.3d 764 (8th Cir. 2013). Similarly, protection is not denied because other employees have not authorized Hershey or Pledger to serve as their spokesperson because coverage is not dependent on "employees combin[ing] with one another in any particular way," *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984), or on the speaker being "specifically authorized" as a "group spokesperson for group complaints," *Worldmark by Wyndham*, 356 NLRB No. 104, slip op. at 14.

Hershey's and Pledger's conversation was part of the process of building sentiment and solidarity around the view that the safety of the roads and trucks had to be improved and, therefore, their conversation was part of the process that might, and did, include employees seeking those improvements from the Respondents. Even if I did not find that Hershey's and Pledger's conversation was part of the ongoing efforts by drivers to seek improvement of working conditions at the quarry, I would find that the conversation was protected because complaints about such serious perceived workplace safety hazards are a fundamental matter of concern to employees and are, on that basis, inherently protected. See *Hoodview Vending Co.*, 359 No. 36, slip op. at 3-4 (2012) (employee conversations are inherently protected when they involve matters of fundamental concern to employees such as wages, job security, and work schedules); see also *St. Bernard Hospital and Health Care Center*, 360 NLRB No. 12, slip op. at 9 (2013) ("The Board has held that an employee who raises safety issues with his employer is engaged in concerted activity that is protected by Section 7 of the Act.")

Since Hershey's and Pledger's January 7 conversation was protected concerted activity the Respondents could not lawfully discipline them for that activity unless the drivers did something so opprobrious or extreme in the course of the activity that they forfeited the Act's protection. *See Fresenius USA Mfg.*, supra; *Atlantic Steel*, supra. Under the Board's decision in *Atlantic Steel*, whether otherwise protected activity has lost the Act's protection depends on a "careful balancing" of the following four factors:

> (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

245 NLRB at 816. The Board has cautioned that while an employer may lawfully discipline an employee engaged in protected activity for making statements that threaten others with, for example, physical harm, it may not discipline an employee for making statements that simply make others annoyed or uncomfortable. *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004); *Alpine Log Homes*, 335 NLRB 885, 894 (2001), *RCN Corp.*, 333 NLRB 295, 300 (2001).

The Respondents make no argument that Hershey and Pledger lost the Act's protection under the *Atlantic Steel* factors. Based on my consideration of those factors, I find that Hershey's and Pledger's activity were neither opprobrious nor extreme. The "place" of the discussion weighs in favor of continued protection. The drivers were at work, in their trucks, and conversing on a radio channel that the Respondents did not use for any business purpose and which the drivers believed the Respondents did not monitor. "The place of work is a place uniquely appropriate for dissemination of views concerning … the various options open to the

employees." *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974). The fact that the conversation occurred in a "place" where management officials were exposed to the drivers' negative opinions should not weigh against continued protection since those officials were only exposed because they chose to clandestinely eavesdrop on the conversation and eavesdropping on protected activity is itself an unfair labor practice. See *Turtle Bay Resorts*, 353 NLRB 1242, 1242 fn.6 (2009), affd. by Board after remand from Court of Appeals, 355 NLRB 706 (2010), enfd. 452 Fed. Appx. 433 (5th Cir. 2011). The subject matter of Hershey's and Pledger's discussion also weighs in favor of continued protection. As discussed above, the focus of the conversation was the drivers' good faith concerns that management was putting their safety at risk. Although the Respondents may disagree that this belief was well-founded, they cannot lawfully muzzle co-workers' discussion of it.[14]

The nature of the outburst here also weighs in favor of continued protection. The Respondents do not allege, and the record does not show, that Hershey or Pledger made threats of physical harm or improper action during their intercepted conversation. Although profanity was used and management officials were the subject of derogatory name calling, such language was not extreme or opprobrious given that the use of profanity on the radios was pervasive and generally tolerated, and that neither employee had reason to believe that the officials to whom they were referring were listening in. It is not surprising that D. Laming was annoyed and uncomfortable because of what he overheard, but under Board precedent it takes more than that to strip employees of the Act's protection. *Chartwells*, supra; *Alpine Log Homes*, supra, *RCN Corp.*, supra.

Regarding the final *Atlantic Steel* factor, the General Counsel has not shown that any part of Hershey's and Pledger's conversation was provoked by an unfair labor practice. This factor however, does not weigh against continued protection since their statements were meant for each other, not their supervisors or managers. In *Fresenius*, 358 NLRB No. 138, slip op. at 7, the Board stated that where the employee's message is directed towards co-workers, not his or her superior, the "lack of employer provocation neither weighs in favor of nor against finding the conduct protected."

Three of the four *Atlantic Steel* factors weigh in favor of continued protection, and the fourth is neutral. I find that Hershey's and Pledger's January 7 conversation about their workplace concerns retained the Act's protection, and that the Respondents violated Section 8(a)(1) of the Act on January 8, 2014, by issuing a verbal warning to them based on that conversation.

The complaint alleges that the Respondents violated Section 8(a)(1) of the Act not only by issuing verbal warnings in response to the protected conversation, but also by responding to that conversation by encouraging Hershey and Pledger to resign. As discussed above, D. Laming's initial reaction to overhearing the employees' criticisms was that he should

[14] The truth or falsity of an employees' communications to others generally is immaterial to the protected nature of the activity. *Phoenix Processor Limited Partnership*, 348 NLRB 28, 46 (2006), petition for review denied sub nom. *Cornelio v. NLRB*, 276 Fed. Appx. 608 (9th Cir. 2008), cert. denied 555 U.S. 994 (2008); see also *R.J. Liberto, Inc.*, 235 NLRB 1450, 1453 (1978) ("Whether [an employee's] facts or interpretation were correct, he was entitled to discuss with his fellow employees his perception of the working conditions and employee problems. Respondent, to be sure had a right to try to counter his arguments, but it had no right to attempt to muzzle his discussions with fellow employees of issues relating to their working conditions.") enfd. 591 F.2d 1336 (3rd Cir. 1979) (Table), and *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040,1053 (1994) (disparagement defense only available to employer if the employee's statements were not only false, but made with malice).

immediately discharge both employees. When D. Laming talked to the employees about what he had overheard, he did not discharge them, but did state that if they "ha[d] a problem [they] need to find a different place to work." He also opined that "if . . . per your conversation you think this is a terrible place to work, you know, I would never work anywhere that I wasn't happy working, and why do you work here?" D. Laming's hostile reaction to the protected activity caused Pledger, quite reasonably, to be concerned that he might be fired. The Board has repeatedly held that statements of the type that D. Laming made to Hershey and Pledger are coercive in violation of Section 8(a)(1). In *Merit Contracting, Inc.*, 333 NLRB 562, 563 (2001), the Board affirmed that the employer's statement to an employee that he could "go work somewhere else" if he was not happy was "implicitly threatening, and therefore had a tendency to interfere with Section 7 rights," in violation of Section 8(a)(1). Similarly, in *House Calls, Inc.*, 304 NLRB 311, 313 (1991), the Board held that when an employer responded to employee complaints about a paycheck delay by saying that "if they did not like it, they could quit" the employer engaged in coercive conduct in violation of Section 8(a)(1). In *Worldmark by Wyndham*, supra, an employer responded to employees' complaints about working conditions by saying "My dad always told me . . . if you didn't like it somewhere, rather than whining and complaining about it, go find another job." The Board affirmed the administrative law judge's conclusion that this statement was coercive in violation of Section 8(a)(1). 356 NLRB No. 104, slip op. at 15. The Respondents do not cite any contrary precedent under which D. Laming's statements to Hershey and Pledger would be lawful.

I find, based on the Board precedent cited above, that D. Laming coerced Hershey and Pledger in violation of Section 8(a)(1) when, on January 8, 2013, he responded to their protected activity by telling them that "if they did not like it, they could quit," and that if "per your conversation you think this is terrible place to work, you know, I would never work anywhere that I wasn't happy working, and why do you work here?"

B. Discharge of Rose

The General Counsel alleges that, on March 25, 2013, the Respondents violated Section 8(a)(1) of the Act when they discriminatorily discharged Rose because he engaged in protected concerted activity by voicing complaints about road conditions during a safety meeting earlier that day. The Respondents counter that their action was not motivated by anything Rose said at that meeting, but rather by his violation of safety rules and the profanity he directed at a customer. The Board applies the *Wright Line* framework to alleged violations of Section 8(a)(1) that turn on employer motivation. *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 349 (2006). Under the *Wright Line* analysis, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by unlawful considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or other protected activity. *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-75 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. See, *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

The General Counsel has succeeded in demonstrating that Rose engaged in protected activity when he raised safety complaints regarding the onsite roads during the March 25 meeting. Concerns about the safety of the onsite roads were shared by all of the Respondents' drivers and Rose engaged in collective group activity when he brought those truly group complaints to the attention of officials at the quarry. See *Meyers Industries*, 281 NLRB at 887 (concerted activities include "individual employees bringing truly group complaints to the attention of management). In addition, I infer that the Respondents knew of these complaints since Rose made them in the presence of two of the Respondents' agents – Schmidt and Allen.[15]

I find, however, that the General Counsel has failed to establish that the Respondents bore hostility towards the protected activity alleged in the complaint – i.e., towards Rose's March 25 comments to Begley (a Great Lakes official) and Stramaglia (a Dan's official) at a meeting during which Begley was seeking the drivers' input. I recognize that the evidence establishes that the Respondents were hostile to drivers complaining about the Respondents' own management during conversations between themselves on the radios and CBs. However, that does not mean that the Respondents were hostile towards drivers expressing their concerns about Great Lakes or Dan's when asked for their input by a Great Lakes official who was discussing safety issues. The March 25 presentation, although attended by two officials of the Respondents, was not being led by those officials and the evidence does not show that Rose criticized the Respondents at the meeting. The General Counsel points to the purportedly heated exchange between the drivers and Stramaglia at that meeting. I doubt that the exchange was particularly heated given the contrary testimony of Begley and Stramaglia – neither of whom is associated with the Respondents. Even assuming that I accept the General Counsel's characterization of the exchange between the drivers and Stramaglia as heated, there is no claim that the Respondents' officials were involved in that exchange. Indeed, although the evidence shows that the Respondents were hostile to drivers discussing their work complaints with one another, the record does not show that the Respondents were hostile to drivers reporting their complaints to management. Drivers continually brought complaints about the condition of the roads and the trucks to Schmidt, and while it is true that this failed to generate the changes some thought necessary, the evidence does not show that Schmidt had reacted in a hostile or coercive manner when drivers presented their complaints to him.[16] The General Counsel argues that the timing of Rose's discharge is suspicious because it occurred on the same day as the safety meeting. However, that argument is not persuasive because it also true that Rose was discharged on the same day that Schmidt was informed that Rose had responded to an instruction to continue working by saying "fuck you, and fuck Vito."

Even if I concluded that the General Counsel had succeeded in making a weak prima face case, I would find that the Respondents met their responsive *Wright Line* burden by

[15] Allen did not testify, or otherwise deny, that he had knowledge of Rose's comments. Schmidt did testify, and stated that he had no specific recollection regarding the March 25 meeting. However, even if, at a trial 11 months after the meeting, Schmidt did not recall Rose's remarks it would not rebut the reasonable inference that he recalled those remarks at the time of Rose's discharge, just hours after the remarks were made.

[16] I note that the complaint does not allege, and the General Counsel does not argue in its brief, that the Respondents discriminated against Rose because he instigated or participated in negativity on the radios and CBs. The complaint does not even claim that Rose's participation in those discussions was protected concerted activity and the General Counsel did not elicit testimony from Rose or other drivers regarding Rose's participation in those conversations. I make no finding regarding the part that those discussions may have played in the decision to terminate Rose since that question has not been raised or fully litigated. Cf. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

showing they would have terminated Rose on March 25 for safety violations and cursing at a customer even absent his protected conduct at the safety meeting. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The uncontradicted evidence shows that earlier that month, Schmidt had caught Rose violating one of the Respondents' six cardinal safety rules by talking on his cell phone while his truck was in motion. That is a serious violation under the Respondents' rules and one that subjects employees to discipline up to and including immediate dismissal. The undisputed evidence was that immediately upon observing this violation, Schmidt "yelled" at, and verbally reprimanded, Rose. Therefore it is clear that Schmidt considered this a serious breach before Rose engaged in protected activity at the safety meeting some days or weeks later. The General Counsel did not show that the Respondents' officials, or Schmidt in particular, had ever observed, or condoned, other drivers talking on cell phones while their trucks were in motion. It was also, in my view, reasonable for Schmidt to be particularly concerned about this safety violation given that Rose had recently been involved in a serious accident and had continued to violate the Respondents' policy requiring employees to wear hard hats while driving.

More importantly, on the day that Rose was terminated, Stramaglia reported to Schmidt that one of Dan's operators had, in accordance with Stramaglia's direction, told Rose to continue accepting loads until the shift ended, but that Rose had refused and said "fuck you" and "fuck Vito [Stramaglia] too." There was no evidence that Schmidt had reason to doubt the veracity of this report from the Respondents' customer. At any rate, Rose himself testified that he had refused the direction to take another load and had responded "like, no, fuck you." I find that this complaint from the Respondents' customer at the quarry would, either alone or in combination with the cell phone violation safety violation earlier that month, have led Schmidt to terminate Rose regardless of anything that Rose said at the safety meeting. In reaching this conclusion, I considered the General Counsel's argument that the Respondents tolerated the use of profanity at the quarry. Rose's use of profanity, however, was more aggravated than that which was shown to be common at the quarry. Rose did not simply use profanity, but he directed the profanity at the Respondents' customer as an expression of hostility and to indicate his refusal of a customer's work-related direction. There was no evidence that the Respondents had tolerated that type of aggravated behavior from any other driver. I credit Schmidt's testimony that he considered cursing at a customer to be unacceptable and more serious than when drivers used curse words among themselves. The General Counsel argues that I should not give credence to this explanation because Stramaglia testified that he was not personally disturbed by the language that he reported Rose using. However, the Respondents are not required to forgive what they consider unacceptable conduct towards a customer just because the customer forgives it. I conclude that the Respondents have satisfied their burden of showing that Rose's behavior on March 22 would have been, in Schmidt's words, the "straw that broke the camel's back" regardless of any protected activity that Rose engaged in at the March 25 safety meeting.

For the reasons discussed above, I conclude that the allegation that Rose was discriminatorily discharged in violation of Section 8(a)(1) because of his protected concerted activity at the March 25 safety meeting, should be dismissed.

C. Discharge of Hershey

The complaint alleges that the Respondents violated Section 8(a)(1) by terminating Hershey's employment on March 27, 2013, because of his protected concerted activities: during the radio conversation with Pledger on January 7; at the safety meeting on March 25; and/or when he posted signs in his work vehicle that publicized complaints about terms and conditions from January 14 to March 27.

The Respondents officials admit that they discharged Hershey because of his radio conversation with Pledger on January 7 and because of the complaints about working conditions that he publicized on the signs he displayed in the truck he drove at the quarry. Therefore, the question of whether those activities were the Respondents' motive for discharging Hershey is not an issue here and the *Atlantic Steel* analysis, rather than the *Wright Line* analysis, is applicable.

The first question under the *Atlantic Steel* analysis is whether the basis upon which the employer acted was protected activity. That question has already been discussed, and answered in the affirmative, with respect to Hershey "badmouthing"/"talking bad" about the Respondents during his January 7 conversation with Pledger. Hershey also engaged in protected concerted activity when he publicized the same, and other, complaints using the signs that he displayed in his truck. The signs carried messages related to the perceived failure of the Respondents to: replace defective parts and tires on the trucks and generally ensure that the trucks were safe to drive; take adequate steps to ensure that onsite roads were maintained in a safe condition; and eliminate paycheck irregularities. Hershey engaged in protected activity when he raised these complaints with co-workers since the complaints concerned working conditions affecting other employees as well as himself. *Worldmark by Wyndham*, supra *Hoodview Vending*, supra; see also *Belle of Sioux City*, 333 NLRB at 105 (communications between employees about pay are inherently concerted if there is a speaker and listeners) and *House Calls, Inc.*, 304 NLRB at 313 (employees engaged in protected concerted activity when they complained that employer was late in distributing paychecks).

The Respondents argue that Hershey's display of signs criticizing management should not be considered protected because Hershey "was not trying to get the other drivers to join him in some kind of organized effort to have management do something," or trying to "make management aware" of the complaints. This argument is not persuasive for the reasons discussed above in reference to the January 7 conversation between Hershey and Pledger. As with that radio conversation, Hershey was using his signs to "voic[e] concerns that pertain to working conditions affecting other employees as well as [himself]." *Phoenix Processor Limited Partnership*, supra. The Board has held that such communications between co-workers are an indispensable step along the way to possible group action and are protected even if the complaints are not being made to management, *Hispanics United of Buffalo*, supra, and even if the employees have not agreed to act together to seek changes, *Salisbury Hotel*, supra. Hershey stated that he displayed the signs complaining about working conditions in an effort to entertain and build morale among the drivers. This is part of the process of building sentiment and solidarity around the conviction that working conditions were unacceptable and required change. J. Laming himself recognized this, testifying that Hershey's signs were "stirring up the crowd." In fact, after Hershey began displaying the signs, other drivers complained to Schmidt about the condition of the roads and the trucks, and in one instance engaged in a group work stoppage over safety concerns.

Under facts similar to those present here, the Board has affirmed that employees engaged in protected concerted activity when they displayed signs critical of their employer in their vehicles. In *RAI Research Corporation*, 257 NLRB 918 fn.3 (1981), enfd. 688 F.2d 816 (2d Cir. 1982) (Table), the Board held that an employee's "display in the windshield of his automobile of a sign reading 'Please Don't Feed the Management. They only Suck Blood' constituted protected activity under Section 7 of the Act, and therefore, [the employer's] discharge of [the employee] for this activity violated Section 8(a)(3) and (1) of the Act." Similarly, in *Holyoke Visiting Nurses Assn.*, 313 NLRB at 1052 and 1053, the Board affirmed that employees engaged in protected activity by displaying signs in their car windows that stated

"Union busting, Its illegal." Under Board law, employees were protected even when they made "various extravagant statements of opinion in describing unattractive features of employers." Id. at 1053.

The Respondents argue that Hershey's display of the signs was not protected because he displayed some signs that did not reference complaints about working conditions affecting employees. It is true that Hershey displayed some signs that did not relate to working conditions and that his display of those signs was not protected. That, however, is completely irrelevant here since the Respondents do not claim that Hershey was discharged because of those unprotected signs. D. Laming and J. Laming testified that the signs they acted on were those that were "badmouthing" or "talking bad" about, the Respondents. Neither D. Laming nor J. Laming ever claimed that they were motivated by, or would have taken action based on, the signs that were unrelated to working conditions.

Since Hershey was engaged in protected concerted activity when he displayed messages critical of working conditions, the Respondents violated Section 8(a)(1) of the Act by discharging him for that activity unless they can show that Hershey's conduct was so opprobrious or egregious as to forfeit the Act's protection. I have considered Hershey's activity under the factors set forth in *Atlantic Steel*, supra, and find that his action was neither opprobrious nor egregious. The first factor – the location of the activity – weighs in favor of continued protection. Hershey was displaying the signs at the jobsite where he and the other affected drivers worked. Longstanding doctrine establishes that employees have a right to display protected messages at their workplace absent special considerations. *Pathmark Stores*, 342 NLRB 378, 379 (2004); *Ellis Electric*, 315 NLRB 1187, 1203 (1994); *United Artists Theatre*, 277 NLRB 115, 128 (1985); see also *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. at 325 ("The place of work is a place uniquely appropriate for dissemination of views concerning … the various options open to the employees."). Moreover, there is no suggestion that Hershey attempted to display the signs in areas at the jobsite that were off-limits or where his normal duties had not taken him. It is true that while driving at the jobsite, Hershey's signs could be seen by persons who worked for Great Lakes and Dan's. Those third parties were not the intended audience for Hershey's signs, but even if it they had been that would not deprive Hershey of the Act's protection since an employee is presumptively privileged to display signs bringing his work-related complaints to the attention of third parties. See *Hills and Dales General Hospital*, 360 NLRB No. 70, slip op. at 2 (2014) (employees "making statements to third parties protesting their terms and conditions of employment . . . is clearly protected by Section 7").

In reaching the conclusion that the "location" of the activity weighs in favor of continued protection, I considered the specific location of the signs within the truck. The Respondents contend that Hershey's placement of the 8 ½ by 11 inch signs in the lower left-hand portion of his windshield created a blind spot and was a safety hazard. This safety concern is clearly an after-the- fact rationalization invented for trial and I do not credit it. Hershey testified that his vision was not impeded by his display of the signs. Neither D. Laming nor J. Laming initially mentioned any safety concerns when testifying about why they terminated Hershey for displaying the signs. It was only in response to leading questions that D. Laming eventually asserted that Hershey's display of the sign would "absolutely" create a blind spot and safety concern for himself and other drivers. Any suggestion that safety played a part in the termination decision, or would have led to Hershey's termination, is contrary to the reasons that the Respondents gave Hershey orally and in writing at the time of his discharge. Moreover, during the 3 months that Hershey displayed the signs, no one ever told him that doing so was a safety violation, even though the record shows that officials at the quarry frequently counseled drivers about workplace behaviors that were considered unsafe.

The subject matter of the messages at-issue also weighs in favor of continued protection. The messages concerned safety and paycheck irregularities. As discussed above, every one of the Respondents' drivers at the quarry had complained to Schmidt about the safety of the trucks and the onsite roads and at one point a group of drivers refused to continue to driving at the quarry because of the perceived hazard. Paychecks problems involve employees' pay and are matters of fundamental concern to employees. *Hoodview Vending*, supra. It is particularly important to employees' rights under the Act that they be permitted to communicate with one another about such significant workplace concerns.

The third *Atlantic Steel* factor, "the nature of the outburst" also weighs in favor of continued protection. In the signs over which the Respondents took action, Hershey was using humor and sarcasm to drive home his criticisms of the Respondents' handling of working conditions. He did not make any threats of violence or unlawful action or use any curse words. It is true that one of the signs included a drawing of a dancing stick figure that was grabbing its crotch. Although this sign was in poor taste, it did not approach being so opprobrious or egregious as to cause Hershey's safety related criticism to lose the protection of the Act. The stick figure was drawn in a child-like, in no way graphic, manner. The pose depicted was a reference to a pose that Michael Jackson had performed in front of millions of people, including on broadcast television. Moreover, to the extent that the picture was suggestive it did not transgress the standards of decorum at a jobsite, such as the quarry, where profanity and sexually charged messages were commonplace and generally tolerated. During the 3 months that Hershey had been displaying the signs prior to his discharge, no one had ever told him that the signs were not appropriate. I do not doubt that, as J. Laming testified, he was personally stung by Hershey's criticism of the working conditions that the Respondents provided to drivers, but the Board has made clear that an employer may not discipline an employee for making statements that simply cause another to feel annoyed or uncomfortable. *Chartwells, Compass Group, USA*, supra, *Alpine Log Homes*, 335 NLRB supra, *RCN Corp.*, supra.

I find that the final *Atlantic Steel* factor – whether the outburst was a response to an unfair labor practice – weighs neither for nor against continued protection. Although Hershey displayed the written criticisms primarily, if not entirely, after the Respondents unlawfully disciplined him for the protected radio conversation with Pledger, Hershey did not claim that he resorted to the signs in response to the Respondents' action to muzzle his oral communications. Assuming that the signs were not a reaction to that unfair labor practice, I conclude that this factor weighs neither for nor against continued protection since the Respondents and Hershey agree that Hershey was using the signs to communicate with his co-workers, not with the Respondents' supervisors or other officials. See *Fresenius*, 358 NLRB No. 138, slip op. at 7 (when employee's message is directed towards co-workers, not his or her superior, the "lack of employer provocation neither weighs in favor of nor against finding the conduct protected").

I find that Hershey engaged in protected concerted activity when he complained about working conditions during his conversation with Pledger and when he displayed signs carrying messages critical of the drivers' working conditions, and that he did not engage in any behavior in connection with those activities that caused him to forfeit the Act's protection. Therefore, the Respondents violated Section 8(a)(1) when they discharged Hershey on March 27, 2013, for engaging in those protected concerted activities.[17]

[17] For the reasons already discussed with respect to Rose, I find that, under *Wright Line*, supra, the General Counsel has failed to establish a prima facie case with respect to alleged discrimination against Hershey based on his statements at the March 25, 2013, safety meeting. The Respondents deny that they were motivated by Hershey's statements at that meeting and the evidence did not show that the

CONCLUSIONS OF LAW

1. The Respondents violated Section 8(a)(1) of the Act: on January 8, 2014, by issuing verbal warnings to employees Michael Hershey and Timothy Pledger because those employees engaged in protected concerted activity; on January 8, 2014, when D. Laming reacted to Hershey's and Pledger's protected concerted activity by telling those employees that "if they did not like it, they could quit," and that "I would never work anywhere that I wasn't happy working, and why do you work here?"; on March 27, 2013, when they discharged Michael Hershey because he engaged in protected concerted activities.

2. The evidence does not show that the Respondents discriminatorily discharged Jeffrey Rose in violation of Section 8(a)(1) because of his protected concerted activity at the safety meeting on March 25, 2012.

REMEDY

Having found that the Respondents engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular the Respondents, having discriminatorily discharged Michael Hershey, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondents shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondents shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[18]

ORDER

The Respondent Lou's Transport, Inc., Pontiac, Michigan, and the Respondent TKMS, Inc., Pontiac, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

Respondents were hostile to employees raising safety complaints regarding Great Lakes and/or Dan's at a Great Lakes safety presentation during which the drivers' input was sought. However, since the evidence shows that Hershey was unlawfully discharged for his protected communications with Pledger on January 7, 2013, and his display of signs from January to March 2013, he is entitled to reinstatement and backpay.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging, warning, or otherwise discriminating against any employee for engaging in protected concerted activity critical of employees' working conditions.

(b) Inviting any employee to quit because he or she engaged in protected concerted activity critical of employees' working conditions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Michael Hershey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Hershey whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from their files any reference to the unlawful verbal warnings issued to Michael Hershey and Timothy Pledger and within 3 days thereafter notify those individuals that this has been done and that the discipline will not be used against them in any way.

(d) Within 14 days from the date of the Board's Order, remove from their files any reference to the unlawful discharge of Michael Hershey and within 3 days thereafter notify him that this has been done and that the discipline will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix,[19] at its own expense, to all employees of the Respondents who worked at their Sylvania quarry jobsite at any time from January 8, 2013, until the completion of the employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondents' authorized representatives.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 5, 2014.

_____
PAUL BOGAS
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge, warn or otherwise discriminate against any of you for engaging in protected concerted activity critical of employees' working conditions.

WE WILL NOT invite you to quit because you engage in protected concerted activity critical of your working conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Michael Hershey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Hershey whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Michael Hershey for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful verbal warnings issued to Michael Hershey and Timothy Pledger, and WE WILL, within 3 days thereafter, notify them in writing that the verbal warnings will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Michael Hershey and, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

Lou's Transport, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

TKMS, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-102517 or by using the QR code below. Alternatively, you can obtain a copy of this decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or b calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.